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Supreme Court, U.S.
FILED

96 - 18 JUL 2 1996

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No._____

IN THE

Supreme Court of the United States

October Term, 1995

ROBERT KEITH NEELY,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether numerous violations of a defendant's Fifth Amendment right against self-incrimination may be held harmless when it is undisputed that the government repeatedly used immunized testimony both directly and indirectly?

2. Whether the Sixth Amendment right to conflict-free counsel permits the government to knowingly and intentionally exploit a conflicted attorney to the detriment of his client so long as the attorney does not actually represent the client at trial?

3. Whether the Fifth Amendment right to due process, which prevents an attorney from turning a new client against a former client, can be excused when it benefits a federal prosecution?

4. Whether a defendant is denied his right to circuit court review of his convictions where the court of appeals fails to address a central claim on appeal which had not been contested by the prosecution and where all caselaw in the circuit supports the claim?

5. Whether mutually exclusive convictions may be upheld when they are based on contradictory affirmative findings of fact?

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities v

Opinions Below 2

Jurisdiction 2

Jurisdiction Below 2

Constitutional Provisions Involved 3

Statement of the Case 4

Reasons for Granting the Writ 8

I. The Fourth Circuit's Application of a Harmless Error Analysis to Immunity Violations, Where the Court Ignored Numerous Instances in Which the Government Repeatedly, Directly and Indirectly, Used Immunized Testimony in Its Investigation and Prosecution, Involves Important Constitutional Questions and Conflicts With Decisions of This Court and Other Federal Circuit Courts 9

II. The Fourth Circuit's Holding That a Defendant's Sixth Amendment Right to Conflict-Free Counsel is Not Violated By the Government's Knowing Exploitation of the Conflict, So Long As the Conflicted Counsel Does Not Actually Represent the Client at Trial, Involves Important Constitutional Questions and Conflicts With Decisions of This Court and Other Federal Circuit Courts 12

III. The Fourth Circuit's Failure to Address Petitioner's Fifth Amendment Due Process Claim, Which Was Not Contested by the Government and is Fully Supported by Binding Precedent, Denied Him His Right of Appeal and Represents a Significant Departure from the Accepted and Usual Course of Judicial Proceedings, Which Calls for an Exercise of this Court's Supervisory Power 16

IV. Petitioner's Convictions on Counts Two and Three are Mutually Exclusive and the Fourth Circuit's Erroneous Holding to the Contrary Conflicts with Decisions of This Court and Other Circuits 19

Conclusion 22

INDEX TO APPENDICES

Appendix A — Unpublished opinion of the United States Court of Appeals for the Fourth Circuit reported as United States v. Neely, No. 94-5107 (4th Cir. Mar. Feb. 13, 1996)

Appendix B — Order of the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing and suggestion for rehearing en banc

Appendix C — Mandate of the United States Court of Appeals for the Fourth Circuit reflecting date of entry of judgment

TABLE OF AUTHORITIES

Cases

Braswell v. United States, 487 U.S. 99 (1988) 9, 12

Cuyler v. Sullivan, 446 U.S. 335 (1980) 14

De La Rosa v. Lynaugh, 817 F.2d 259 (5th Cir. 1987) . . 21

Douglas v. Long, 661 F.2d 747 (9th Cir. 1981) 21

Fisher v. United States, 425 U.S. 391 (1976) 9, 12

Flowers v. Tandy Corp., 773 F.2d 585 (4th Cir. 1985) . . . 20

Glasser v. United States, 315 U.S. 60 (1942) 14

Heflin v. United States, 358 U.S. 415 (1959) 20

Kastigar v. United States, 406 U.S. 447 (1972) 9-12

Milanovich v. United States, 365 U.S. 551 (1961) 20

Mitchell v. Maggio, 679 F.2d 77 (5th Cir. 1982) 14

Parker v. Parratt, 662 F.2d 479 (8th Cir. 1981) 14

Thomas v. United States, 314 F.2d 936 (5th Cir. 1963) . . 21

United States v. Clark, 928 F.2d 639 (4th Cir. 1991) 20

United States v. Daigle, 149 F. Supp. 409 (D.D.C.),
aff'd per curium, 248 F.2d 608 (D.C. Cir. 1957),
cert. denied, 355 U.S. 913 (1958) 21

United States v. Gaddius, 424 U.S. 544 (1976) 20

United States v. Gross, 961 F.2d 1097 (3d Cir. 1992) . . . 21

United States v. Harris,
973 F.2d 333 (4th Cir. 1992) 10-11

United States v. Magana-Olvera,
917 F.2d 401 (9th Cir. 1990) 20

United States v. Magini, 973 F.2d 261 (4th Cir. 1992) . . . 15

United States v. Moody, 923 F.2d 341 (5th Cir. 1991) . . . 21

United States v. North,
910 F.2d 843 (D.C. Cir. 1990) 10-12

United States v. Powell, 469 U.S. 57 (1984) 21-22

United States v. Schell, 775 F.2d 559 (4th Cir. 1985),
cert. denied, 475 U.S. 1098 (1986) 17-18

United States v. Tatum, 943 F.2d 370 (4th Cir. 1991) . . . 13

United States v. (Under Seal),
774 F.2d 624 (4th Cir. 1985) 17

United States v. Winstead,
708 F.2d 925 (4th Cir. 1983) 20

United States v. Young, 644 F.2d 1008 (4th Cir. 1981) . . 18

Wheat v. United States, 486 U.S. 153 (1988) 16

Wood v. Georgia, 450 U.S. 261 (1981) 14

Constitutional Provisions

U.S. Const. amend. V ..... *passim*

U.S. Const. amend. VI ..... *passim*

Statutes

18 U.S.C. § 6002 4

21 U.S.C. § 2 19

21 U.S.C. § 846 19

28 U.S.C. § 1294 18

Rules

Fed. R. Crim. Pro. 44(c) 13, 15-16

No._____

In the Supreme Court of the United States of America

October Term, 1995

ROBERT KEITH NEELY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your Petitioner, Robert Keith Neely, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth

Circuit sustaining convictions obtained in violation of his Fifth Amendment right to due process and right against self-incrimination and the Sixth Amendment right to counsel when the government used the defendant's immunized testimony in their prosecution against him; used his own attorney to help investigate and prosecute him; and where two of his convictions are mutually exclusive.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is reprinted in Appendix A of this Petition. The order of the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing and suggestion for rehearing en banc is reprinted in Appendix B.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on February 13, 1996. Appellant's Petition for Rehearing was denied on March 11, 1996 and is set forth in Appendix B. Appellant's application for extension of time within which to file a petition for a writ of certiorari was granted by the Chief Justice on May 21, 1996, extending the time to file to and including July 9, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

JURISDICTION BELOW

Jurisdiction in the District Court was based on 18 U.S.C. § 3231. Appellate jurisdiction in the United States Court of Appeals for the Fourth Circuit was based on 28 U.S.C. § 1294.

CONSTITUTIONAL PROVISIONS INVOLVED

The due process clause and the right against self-incrimination applicable to federal prosecutions are set forth in the Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The right to counsel is set forth in the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have previously been ascertained by law, and be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

STATEMENT OF THE CASE

In September 1990, Petitioner Robert Keith Neely pled guilty to possession of cocaine. At that time, he was represented by attorneys Edward Jasie and James Turk. These attorneys also met with the Assistant United States Attorney, FBI and IRS concerning an ongoing investigation of Neely. From September to December, 1990, Turk continued to represent Neely in the upcoming sentencing for the possession of cocaine.

On 6 December 1990, a federal grand jury returned a three count indictment against Neely concerning alleged grand jury leaks. At about the same time, a grand jury subpoena was issued to Neely for records for his solo practice law firm and for other personal records. This was part of the investigation about which his two attorneys, Jasie and Turk, were in contact with the prosecution. Neely moved to quash the subpoena because it was overbroad and violated his Fifth Amendment rights. The motion was granted on 14 December 1990. Rather than appeal, the prosecution obtained leave from the Department of Justice to request from the court an order giving Neely use immunity pursuant to 18 U.S.C. § 6002. The court granted what the prosecution wanted; i.e., use immunity. Neely complied with this subpoena and turned over volumes of records to an agent for the IRS in reliance on the use immunity order entered by the court at the prosecution's request. The IRS agent gave the documents to the grand jury and told them that he had just received them from Neely.

After the government reviewed the documents produced under the use immunity order, Neely was served, on 29 May 1991, with another subpoena which requested additional records. This time the prosecution changed its request and, instead of use immunity, the government sought and obtained an order for act of production immunity. Since this second

order covered act of production only, Neely filed a motion to quash the subpoena, raising Fifth Amendment issues. The motion to quash was granted in part. It is significant that, when the government sought use immunity, all subpoenaed documents were ordered produced. When only act of production immunity was sought, the judge granted the subpoena only in part; i.e., some documents were not ordered produced.

In March 1992, Leigh Hurst was charged in an unrelated money laundering indictment in the Western District of Virginia. Hurst retained the same attorney as Neely, James Turk, to represent him on these charges. While representing Hurst, Turk was also representing Neely regarding his probationary status from his possession of cocaine case. Hurst, through his lawyer, Turk, began to cooperate with the government against Neely. Turk continued to represent both Hurst and Neely. The government knew of this actual conflict, but did not inform the district court or take any action to prevent this conflicting representation. Neely had no knowledge of the fact that his lawyer, Turk, had turned another client, Hurst, against him.

Hurst proffered evidence against Neely to AUSA Peters and other government agents. Turk negotiated a plea agreement for Hurst in which Hurst would testify against Turk's other client, Neely. Pursuant to his agreement, Hurst wore a wire against Neely to tape record him on behalf of the prosecution. Hurst testified before the grand jury against Neely. He was also a witness for the prosecution at Neely's trial. Neither Turk nor the government informed the court of the conflict until after the formal plea had been duly executed, presented to, and accepted by the court. Turk withdrew as counsel for Hurst only after the court agreed to accept Hurst's plea and agreement. They did not tell Neely.

On 17 June 1992, Neely was indicted for fourteen

counts of money laundering, drug involvement, and racketeering. A superseding fourteen count indictment was returned on 17 September 1992. Leigh Hurst, among others, was named in the indictment as an unindicted co-conspirator.

On 12 February 1993, the trial court held a Kastigar hearing on the immunity orders. The only witness called by the government was IRS agent Suzanne Hines. She testified that the documents produced by Neely were brought before the grand jury by Agent Higginbotham who identified them to the grand jury as having been produced by Neely. She further testified that these documents where taken from the grand jury, reviewed and used to help the prosecution with its investigation. They were also reviewed by prosecution witnesses who were informed that they had come from Neely. After having been informed of its source, these witnesses used the information to testify for the prosecution. Both Michael Giacolone and Tangie Vest testified for the government and that testimony was based on the contents of immunized records and the knowledge that Neely had produced them.

At trial, Agent Hines told the jury that some of the documents introduced into evidence had been obtained from the defense. Once this statement was made, counsel for Neely moved for a mistrial based upon the violation of immunity orders. The court overruled this motion and, on 26 March 1993, the jury returned guilty verdicts against Neely for conspiracy to possess cocaine, aiding and abetting the distribution of cocaine, money laundering, and distribution of marijuana. On 28 January 1994, Neely was sentenced to serve 121 month in prison.

A Notice of Appeal was timely filed, briefs were submitted and oral argument was heard by the Fourth Circuit Court of Appeals.

Petitioner's appeal addressed the government's repeated use of Neely's immunized testimony against him because it violated his Fifth Amendment right against self-incrimination. In addition, his Sixth Amendment right to counsel was violated when Turk continued to represent Neely while laboring under an actual and harmful conflict of interest caused by his representation of his client Hurst against his client Neely. The prosecutor knew of this conflict while Neely did not; and yet, the prosecutor did nothing to stop it. In fact, the prosecutor exploited it.

Further, Neely's appeal addressed the violation of his Fifth Amendment right to due process when the government used Turk, Neely's own attorney, as a key component of their investigation and prosecution of Neely. Finally, Petitioner sought reversal of his convictions for conspiracy to possess cocaine and aiding and abetting the distribution of cocaine because, in this case, the affirmative findings of the trial jury were mutually exclusive.

The Fourth Circuit, when addressing these issues, agreed that the government had violated Neely's Fifth Amendment right against self-incrimination through the improper use of his immunized testimony. (A20-21). Nevertheless, the court mistakenly found that the error was "harmless." (A20-22). The Fourth Circuit erroneously ignored numerous undisputed instances in which the government directly and indirectly used immunized testimony against Mr. Neely.

The Fourth Circuit also recognized that the government knowingly permitted attorney Turk to simultaneously represent both Hurst, a government witness and informant against Neely, and Neely himself. (A8, 23). Yet the appeals court rejected Petitioner's Sixth Amendment claim based on the erroneous belief that this conflict was unrelated to this case. (A8, 24-25).

The court of appeals held, essentially, that as long as Turk did not continue to represent Neely in the actual trial of the instant case, there was no Sixth Amendment violation from the government's knowing and willful exploitation of the admitted conflict. (A24-25). According to the Fourth Circuit, there is no right to conflict-free counsel during the crucial proceedings and negotiations that commonly occur prior to indictment and trial.

The Fourth Circuit did not address Petitioner's claim that his Fifth Amendment right to due process was violated when the government used attorney Turk to turn a new client, Hurst, against his first client Neely and to further receive assurances from Turk that he would testify against client Neely (all while he was representing both Hurst and Neely). The opinion did not analyze this claim or the uncontroverted facts and binding cases that supported Neely's position. This issue was essentially ignored and denied even though neither the government nor the Fourth Circuit addressed it and there was no caselaw in opposition.

With regard to the mutually exclusive verdicts, the Fourth Circuit mischaracterized them as "inconsistent verdicts" and failed to recognize the contrary affirmative findings of the trial jury. (A29). The appeals court's analysis and holding conflicts with decisions of this Court and of other circuits.

REASONS FOR GRANTING THE WRIT

There are numerous reasons why certiorari should be granted in this case. This Petition presents significant federal constitutional issues regarding the applicability of harmless error analysis to violations of court-ordered immunity and the scope of the Fifth and Sixth Amendment right to conflict-free counsel. Additionally, the Fourth Circuit's failure to directly address a crucial due process issue on appeal represents a significant departure from the accepted and usual course of judicial

proceedings which calls for an exercise of this Court's supervisory power. Finally, with respect to these issues and the mutually exclusive verdicts, the opinion below conflicts with decisions of this Court and other federal appeals courts.

I. The Fourth Circuit's Application of a Harmless Error Analysis to Immunity Violations, Where the Court Ignored Numerous Instances in Which the Government Repeatedly, Directly and Indirectly, Used Immunized Testimony in Its Investigation and Prosecution, Involves Important Constitutional Questions and Conflicts With Decisions of This Court and Other Federal Circuit Courts

In the landmark case of Kastigar v. United States, 406 U.S. 447 (1972), this Court held that the Fifth Amendment privilege against self-incrimination exists to protect "against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might so be used." Id. at 444-45. To overcome this Fifth Amendment privilege, the prosecution must grant immunity that is "coextensive with the scope of the privilege." Kastigar, 406 U.S. at 450.

This Court has held that there are three aspects of "compelled testimony" covered by the privilege against self-incrimination. First, is the contents of documents produced under a use immunity order. Where there is use immunity, the contents of documents may be used against others, but may not be used against the immunized individual. Second is the act of production itself. Under act of production immunity, the contents can be used against the immunized individual, but the act of production cannot. See, e.g., Braswell v. United States, 487 U.S. 99, 118 (1988); Fisher v. United States, 425 U.S. 391, 410 (1976). The third aspect is derivative use. In other words, as the Fourth Circuit itself has recognized, the government may

not "alter its investigatory strategy as a result of [an] immunized statement." United States v. Harris, 973 F.2d 333, 336 (4th Cir. 1992). The use of immunized documents to "obtain or explicate" evidence subsequently used against the immunized person is prohibited. Id. at 337 n.2; see also Kastigar, 406 U.S. at 460 (holding that the privilege bars the use of compelled testimony as an "investigatory lead" and any evidence obtained by focusing the investigation as a result of the compelled disclosure).

The Fourth Circuit recognized that the contents of documents subpoenaed from Mr. Neely were shown to numerous government witnesses including Michael Giacolone, Tangie Vest, and IRS Agents Higginbotham and Hines. (A19-21). The opinion also recognized that some documents were subject to act of production immunity and that this immunity (and, consequently, Neely's Fifth Amendment right against self-incrimination) was violated when Agent Higginbotham identified Mr. Neely as the source of the documents to a grand jury and Agent Hines identified Neely as the source of the documents during her trial testimony. (A20-21). Neely, as the source, was also made known to Mr. Giacolone and Ms. Vest in their preparation as trial witnesses for the prosecution. Yet, the court of appeals, citing United States v. Harris, 973 F.2d 333 (4th Cir. 1992), erroneously held these errors to be harmless beyond a reasonable doubt based on its impression that they had only a slight impact on the grand and trial juries. (A20).

The Fourth Circuit's analysis is incorrect, and in conflict with decisions of this court and other federal courts of appeal, for numerous reasons. First, the court of appeals disregards the fact that the first set of documents were produced under a use immunity order that barred *any* use. See, e.g., United States v. North, 910 F.2d 843, 861 (D.C. Cir. 1990). Their contents were directly used by the government in its investigation and

prosecution of Neely, and were shown to Giacolone and Vest, in violation of the use immunity order. Such violations could not be deemed harmless, even if harmless error analysis were proper.

Second, even assuming - *arguendo* - that the use immunity order can simply be disregarded, these documents were protected by an act of production immunity. While the Fourth Circuit recognized that act of production immunity was violated when Agents Higgenbotham and Hines tied the documents to Neely before the grand and trial juries, the court ignored the fact that it was also violated when witnesses Giacolone and Vest were told that the documents they used to prepare their trial testimony came from Neely.[1]

Third, and absent from the lower appellate court's analysis is the fact that the government failed to demonstrate that it did not use the immunized testimony -- with respect to both content and act of production -- to "obtain or explicate" evidence subsequently used against Mr. Neely. See Harris, 973 F.2d at 337 n.2; Kastigar, 406 U.S. at 460. When the government violates an immunity order, it carries a "heavy burden" of establishing that the immunized testimony was not used in any way to further the case against the defendant. Harris, 973 F.2d at 336-38; Kastigar, 406 U.S. at 461-62. In the instant case the government not only never met, but also did not even attempt to meet, this "heavy burden." In fact, the government does not deny that these documents were used to obtain, explicate and understand evidence. This use had to also have included the testimony of Don Kimbler, a key prosecution

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[1] The lower appellate court completely failed to give any consideration to the immunity violations which helped prepare these two prosecution trial witnesses. This is in conflict with North and violates Kastigar.

witness.

The Fourth Circuit's harmless error analysis, disregarded the violation of a court-ordered grant of use immunity, ignored violations of court-ordered act of production immunity, and did not require the government to meet its heavy burden -- or any burden -- with regard to direct and derivative use. The Fourth Circuit's decision is in conflict with decisions of this Court and of other circuit courts.[2] See, e.g., Kastigar, 406 U.S. at 450; Braswell, 487 U.S. at 118; Fisher, 425 U.S. at 410; North, 910 F.2d at 861. In addition, this approach effectively eliminates the constitutional privilege against self-incrimination. If this Court is going to ratify such a decision and change the law in this area, then it should do so by granting this Petition, hearing this case, and making the law in this area clear.

II. The Fourth Circuit's Holding That a Defendant's Sixth Amendment Right to Conflict-Free Counsel is Not Violated By the Government's Knowing Exploitation of the Conflict, So Long As the Conflicted Counsel Does Not Actually Represent the Client at Trial, Involves Important Constitutional Questions and Conflicts With Decisions of This Court and Other Federal Circuit Courts

The Fourth Circuit agreed that the government knowingly permitted attorney Turk to simultaneously represent both Hurst, a government informant and witness against Mr. Neely, and Mr. Neely himself while keeping knowledge of the conflict from the district court and Neely. (A8). This opinion further acknowledged that when "a conflict situation becomes

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[2] In fact, the government did not deny numerous instances of direct and derivative use ignored by the Fourth Circuit in its analysis.

apparent to the government, the government has a duty to bring the issue to the court's attention and . . . move for disqualification of counsel." (A8) (citing United States v. Tatum, 943 F.2d 370, 379-80 (4th Cir. 1991)); see also Fed. R. Crim. Pro. 44(c) (compelling courts to act to protect defendants' right to conflict-free counsel).

In the instant case, the government failed to bring this known conflict to the district court's attention until after Turk negotiated an agreement for his client Hurst to cooperate with the government against his client Neely, had the agreement implemented over two months of debriefings and proactive cooperation, presented the plea agreement to the court, and had the court accept it. (A8-9, 22-24). The court of appeals condoned this exploitation of a known conflict, and affirmed Mr. Neely's conviction, "[b]ecause Turk did not represent Neely on the instant charges." (A24-25). This is simply not true. Representation "on the instant charges" included pre-trial meetings between counsel for the defense and counsel for the prosecution which occurred regarding the charges that were ultimately filed. Attorney Turk participated in these meetings and discussions as Neely's lawyer.

Individuals often retain counsel before charges are actually filed and, certainly, before the trial itself begins. Negotiations and other related events between the prosecution and defense attorneys frequently occur before an indictment or arrest. People are entitled to conflict-free counsel in these early, critical stages of the case just as they are at trial itself. They rely on the criminal justice system and the Constitution to protect them from being unfairly manipulated by the government through the use of conflicted defense counsel. The decision below departs from precedent and says that the system, and the Constitution, no longer offer such protection and that the prosecution should exploit such conflicts.

The following unconverted facts were presented on appeal: (1) Turk was representing Neely during the time he also represented Hurst; (2) while Turk was representing Neely, he negotiated a plea agreement for Hurst, in which Hurst agreed to work proactively and to testify against Neely in the instant case; (3) Turk represented Neely with respect to negotiations with the same prosecutor about the money laundering allegations that were part of the indictment in the instant case long before he represented Hurst and turned Hurst against Neely in the instant case; and (4) that AUSA Karen Peters (who prosecuted both Neely and Hurst) was well aware of -- and consciously exploited -- Turk's undeniable conflict of interest.

The Fourth Circuit has effectively held that an individual does not have a Sixth Amendment right to be protected from the prosecution's exploitation of his or her own counsel except during the trial itself. This dramatically narrows the scope of Sixth Amendment protections and is in conflict with decisions of this Court and other circuits.

This Court has consistently and repeatedly held that the Sixth Amendment right to counsel includes the right to effective assistance free from conflicts. See, e.g., Wood v. Georgia, 450 U.S. 261, 271 (1981); Cuyler v. Sullivan, 446 U.S. 335, 344 (1980); Glasser v. United States, 315 U.S. 60, 70 (1942). Other federal circuits have recognized that a conflict of interest exists where, as in the instant case, the factual circumstances require counsel to offer evidence which assists one client but adversely affects another. Parker v. Parratt, 662 F.2d 479, 484 (8th Cir. 1981). An actual conflict of interest occurs when, as here, a defense attorney is placed in a situation "inherently conducive to divided loyalties." Mitchell v. Maggio, 679 F.2d 77, 79 (5th Cir. 1982).

An actual conflict existed in the instant cases since attorney Turk owed a duty to one client, Hurst, that was

detrimental to another client, Neely. Clearly, Turk had an actual conflict once his client Hurst began to cooperate against his other client, Neely. Turk actively represented Hurst's interests and obtained a favorable plea agreement for Hurst against the interest of his other Neely. This is a classic impermissible conflict.

This conflict arose before trial and even prior to the filing of formal charges. It arose the moment Turk learned that Hurst had information which Hurst could used against Neely to help himself, information which was related to the instant case. At that time, Turk represented both men. As Hurst's lawyer, Turk had an obligation of confidentiality to Hurst to keep from Neely the fact that he was cooperating against Neely. But, as Neely's attorney, Turk also had a conflicting obligation to tell Neely about what Hurst was doing and to use this information against Hurst to help Neely. For example, Turk should have used this information to determine whether it was time to explore an agreement with the government on Neely's behalf and to tell Neely that Hurst had become a government witness. The Fourth Circuit has explicitly recognized that a conflict which "causes counsel to fail to explore possible plea negotiations" implicates the Sixth Amendment right to counsel. United States v. Magini, 973 F.2d 261, 263 (4th Cir. 1992). That is precisely what happened in the instant case.

Both Turk and AUSA Peters were aware of Turk's conflict from the moment it began. Neely did not know about it. They hid it from him. They also had a duty to inform the court of the conflict. See Fed. R. Crim. Pro. 44(c).[3] Both

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[3] In contrast to the instant case, where the prosecution exploited the conflict while keeping it hidden from view, the government consistently invokes Rule 44(c) when it is to their benefit. This Court has recognized that the

Peters and Turk knew that Turk had a duty to immediately withdraw as counsel. That did not happen. Instead, Turk joined the government against Neely, his own client. Neither the conflicted attorney nor the prosecution brought the obvious conflict to any court's attention until after all the i's were dotted and the t's crossed in the case against Neely. They closed the barn door after the horse was gone.

Under the Fourth Circuit's holding, the prosecution can now exploit a conflict of interest and encourage an attorney to turn one client against another without violating the Sixth Amendment right to conflict-free counsel. The only apparent requirement in the Fourth Circuit is that the conflicted attorney withdraw prior to trial, but after the conflict has been fully exploited by the government to his client's detriment. Such a holding is in clear conflict with the holdings of this Court and other circuits and completely eviscerates the constitutional right to conflict-free counsel. This sort of significant change in the law and conflict with other courts requires consideration by this Court.

III. The Fourth Circuit's Failure to Address Petitioner's Fifth Amendment Due Process Claim, Which Was Not Contested by the Government and is Fully Supported by Binding Precedent, Denied Him His Right of Appeal and Represents a Significant Departure from the Accepted and Usual Course of Judicial Proceedings, Which Calls for an Exercise of this Court's Supervisory Power

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government may, under Rule 44(c), "seek to 'manufacture' a conflict in order to prevent a defendant from having a particularly able defense counsel at his side." Wheat v. United States, 486 U.S. 153, 163 (1988). In this case, they violated Rule 44(c) by ignoring it.

The facts of record clearly establish that Neely's attorney, Turk, took on a new client, Hurst, and turned this new client against Neely. On appeal, Mr. Neely asserted that his Fifth Amendment right to due process was violated when the government used Turk to help prosecute him. This contention was in the Statement of Issues and was articulated in his Summary of Argument. It was clearly presented in the text of both his opening brief and his reply brief. Yet, the court of appeals did not address this claim. With regard to Turk, the Panel's opinion only considered Neely's Sixth Amendment claim. The Fifth Amendment argument, and the numerous cases that supported it, were not addressed in the opinion.

The due process issue was exceptionally well supported by binding precedent directly on point which mandated a judgment for Mr. Neely. The Fourth Circuit has previously recognized that effective assistance of counsel is a fundamental right and is an essential element of due process. United States v. (Under Seal), 774 F.2d 624, 627 (4th Cir. 1985). The Fourth Circuit also recognizes that the Fifth Amendment due process clause is violated when, as here, an attorney represents a client and then, as in the instant case, participates in the prosecution of that same client See United States v. Schell, 775 F.2d 559, 566 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986). The Fourth Circuit has held that:

> Although successive representation of co-defendants differs chronologically from multiple representation of co-defendants by the same lawyer, the possibility of a conflict of interest is not dispelled by the termination of the former lawyer's services. The lawyer may have received confidential information from his former client that is detrimental to that client but favorable to the lawyer's present client. In this event, a conflict of interest arises that is not substantially different from that which may occur in instances of multiple representation.

United States v. Young, 644 F.2d 1008, 1012 (4th Cir. 1981) The Young court specifically noted that such a conflict compromises "the defendant's right to a fair trial, which the due process clause secures." Id. This is true even when the conflicted attorney does not represent the accused at trial. The violation occurs the moment the conflicted lawyer helps prosecute a current or a former client by turning one client against another.

Under the undisputed facts accepted by the Fourth Circuit, it is clear that Mr. Neely's Fifth Amendment right to due process was denied when the government exploited the conflict they helped create and used Turk, Neely's attorney, in their prosecution against Neely. Yet, the court of appeals did not address this issue and ignored its own cases, such as Schell and Young, that require a reversal of Neely's convictions. See, e.g., Schell, 775 F.2d at 566 (holding that the remedy for a conflict in cases, such as this, where an attorney switches sides to help prosecute his own client is to reverse the convictions and dismiss the indictment). Indeed, even the prosecution in their opposing brief offered not one case in opposition to Mr. Neely's position on this issue.

Mr. Neely has a right to appellate review of his convictions by the Fourth Circuit. See 28 U.S.C. § 1294. Petitioner's right to circuit court review is stripped of any and all meaning if the court of appeals is simply free to fail to address one of the key issues; particularly where his position is strongly supported by prior decisions in this circuit which require reversal and is unopposed by the government.

IV. Petitioner's Convictions on Counts Two and Three are Mutually Exclusive and the Fourth Circuit's Erroneous Holding to the Contrary Conflicts with Decisions of This Court and Other Circuits

Petitioner was convicted of Count Two of the Superseding Indictment, conspiracy to possess under 21 U.S.C. § 846, and Count Three of the Superseding Indictment, aiding and abetting possession with intent to distribute under 21 U.S.C. § 2. The aiding and abetting count was incorporated as overt act number 32 in furtherance of the alleged conspiracy to distribute in Count Two. Both convictions required an affirmative finding of fact beyond a reasonable doubt of the intent of the defendant. The intent to possess was required to be found by the jury beyond a reasonable doubt if they were to decide that this was a conspiracy to only possess. This is the intent the jury found beyond a reasonable doubt; i.e., intent only to possess in Count Two. That finding of intent to possess in Count Two with its overt act 32 (intent to aid and abet distribution) precludes a finding of a simultaneous and opposite intent to distribute which was required as an affirmative finding for jury to convict on the aiding and abetting count.

The two affirmative findings made by the jury are mutually exclusive because the underlying facts, conduct and time frame for both counts were the same. They were not separated in evidence, nor in argument by the prosecution to the jury. Once the jury affirmatively decided that Mr. Neely was in a conspiracy and that his intent, including his intent in Count Three (since it was overt act 32 in Count Two), was merely to possess, they could not also find that he had the simultaneous intent to distribute required for a conviction on Count Three.

In order to convict of conspiracy under 21 U.S.C. § 846, the government had to prove that the Defendant: (1) agreed to undertake conduct that would violate the laws of the

United States; (2) committed one or more overt acts in furtherance of that purpose; and (3) intended to commit the underlying offense. United States v. Clark, 928 F.2d 639, 641-42 (4th Cir. 1991); United States v. Magana-Olvera, 917 F.2d 401, 409 (9th Cir. 1990). Similarly, a conviction for aiding and abetting required a finding that the Defendant (1) "knowingly associated himself with and (2) participated in the criminal venture." Flowers v. Tandy Corp., 773 F.2d 585 (4th Cir. 1985). To prove the element of "association", the prosecution "must show that the defendant shared in the principal's criminal intent." United States v. Winstead, 708 F.2d 925 (4th Cir. 1983).

The conviction on the conspiracy count was possession, and thus a conviction on the conspiracy count (Count Two) required an affirmative finding of the specific intent to possess. The conviction on Count Three, aiding and abetting distribution, required an affirmative finding of a specific intent to distribute. Since the aiding and abetting count was charged in the Superseding Indictment as an overt act in furtherance of the conspiracy and because each required affirmative findings of mutually exclusive "intents", the two convictions are mutually exclusive verdicts and are, therefore, impermissible.

This Court has consistently noted that mutually exclusive verdicts are impermissible. In Heflin v. United States, 358 U.S. 415 (1959), this Court stated that it was plain error to allow a jury to convict a defendant of both robbing a bank and receiving the proceeds of the robbery. In Milanovich v. United States, 365 U.S. 551, 555-56 (1961), this Court reaffirmed the Heflin decision and further noted that it was not enough to set aside the shorter sentence, but that both convictions must be reversed and remanded. See also United States v. Gaddius, 424 U.S. 544, 547 (1976).

The United States District Court for the District of

Columbia has stated that "where a guilty verdict on one count negatives some fact essential to the finding of guilt on a second count, two guilty verdicts may not stand." United States v. Daigle, 149 F. Supp. 409, 414 (D.D.C.), aff'd per curium, 248 F.2d 608 (D.C. Cir. 1957), cert. denied, 355 U.S. 913 (1958). Numerous federal circuits also require reversal where the verdicts are based on mutually exclusive findings of fact; i.e., one necessarily excludes the other. See United States v. Gross, 961 F.2d 1097, 1107 (3d Cir. 1992) (stating that mutually exclusive convictions are "patently unjust"); United States v. Moody, 923 F.2d 341, 346 (5th Cir. 1991) (noting that permitting jury to return mutually exclusive verdicts requires a new trial be granted); Douglas v. Long, 661 F.2d 747, 749 (9th Cir. 1981) (noting that the defendant cannot be convicted of mutually exclusive alternatives); Thomas v. United States, 314 F.2d 936, 939 (5th Cir. 1963) (holding that, where there is inconsistency between guilty verdicts on two counts, they cannot both stand). In the instant case, as noted supra, the guilty verdict on conspiracy negates the intent necessary for the guilty verdict on aiding and abetting. See De La Rosa v. Lynaugh, 817 F.2d 259, 268 (5th Cir. 1987) (holding a voluntary manslaughter conviction prevents the government from asserting that the defendant had the state of mind to commit murder).

The Fourth Circuit erroneously considered this to be a case of inconsistent verdicts. (A29). It was not. This is a case where the jury made affirmative findings of fact where one finding excludes the other. The jury did not make inconsistent negative findings.[4]

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[4] In the landmark decision of United States v. Powell, 469 U.S. 57 (1984), the Supreme Court addressed inconsistent verdicts. An "inconsistent verdict" involves a conviction on one count that is inconsistent with an acquittal on

The Fourth Circuit's holding, which fails to distinguish between impermissible mutually exclusive verdicts and permissible inconsistent verdicts, conflicts with decisions of this Court and other circuits. Convictions which are mutually exclusive cannot be permitted to stand.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter. This Petition presents a number of significant federal constitutional issues in which the Fourth Circuit's holdings conflict with decisions of this Court and other federal circuit courts. The first issue is whether the lower appellate courts can ignore numerous immunity violations in order to hold that the government's unconstitutional use of immunized material to build and prosecute a case is "harmless." The second is whether the government is permitted to exploit conflicted counsel in the investigation and prosecution of an individual, so long as new counsel is substituted at the actual trial.

Additionally, the Fourth Circuit's failure to directly address a crucial due process issue on appeal -- an issue which was not contested by the government and is fully supported by binding precedent -- represents a significant departure from the accepted and usual course of judicial proceedings which calls for an exercise of this Court's supervisory power. A defendant's

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another count. Id. at 58. An example would be a verdict that acquits on all predicate offenses while convicting on a compound offense. Id. at 65. The Powell Court specifically noted that the decision did *not* include the situation whereas here, "a guilty verdict on one count logically excludes a finding of guilt on the other." Id. at 69 n.8. That situation exists here.

right to appellate review is deprived of all meaning if the court of appeals is free to fail to address one of the key issues. This is particularly true where, as here, the defendant's position is strongly supported by binding precedent, is not contested by the government and, under agreed facts and existing caselaw, requires reversal.

Finally, the Fourth Circuit held that there was no difference between impermissible mutually exclusive verdicts and permissible inconsistent verdicts. This holding conflicts with decisions of this Court and other federal appeals courts.

DATED: July 1, 1996.

Respectfully Submitted,

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Appendix A:
Opinion of Fourth Circuit Court of Appeals

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v. No. 94-5107

ROBERT KEITH NEELY,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Virginia, at Roanoke.
Jackson L. Kiser, Chief District Judge.
(CR-92-78-R)

Argued: November 3, 1995

Decided: February 13, 1996

Before WIDENER, WILKINSON, and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Marvin David Miller, Alexandria, Virginia, for Appellant. Thomas Ernest Booth, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Thomas M. Blaylock, Roanoke, Virginia, for Appellant. Robert P. Crouch, Jr., United States Attorney, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Robert Keith Neely appeals his convictions on money laundering and narcotics charges, contending that they are invalid on several grounds. Specifically, Neely claims that: (1) the district court erred in refusing to dismiss for prosecutorial misconduct; (2) the Government used documents in its investigation of Neely that he produced pursuant to a use-immunity order, in violation of Neely's Fifth Amendment right against compelled self-incrimination; (3) the Government knowingly allowed counsel laboring under an actual conflict of interest to represent Neely, in violation of his Sixth Amendment right to counsel; (4) the Government abused the grand jury process; (5) the district court erred in permitting two Government case agents to remain in the courtroom during trial; and (6) Neely's convictions on Counts Two and Three are mutually exclusive, requiring vacatur of the conviction on Count

Three. We reject all of these contentions and accordingly affirm Neely's convictions.

I.

The evidence presented at trial, viewed in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), establishes the following facts. Until his convictions, Neely was an attorney with a sole-practice law firm, R. Keith Neely, P.C., in Christiansburg, Virginia, specializing in criminal defense work. In May 1986, while representing one of several defendants in a complex drug conspiracy case, Neely met Donald Kimbler, a private investigator from Miami, Florida, who was working for another attorney involved in the same case. At that time, Kimbler, a former agent for the Bureau of Alcohol, Tobacco, and Firearms (ATF), was a small-scale cocaine dealer in the Miami area, but had never used cocaine himself. Kimbler and Neely quickly became close friends, and Neely introduced Kimbler to the use of cocaine.

At Kimbler's request, Neely introduced Kimbler to persons interested in purchasing cocaine. Neely arranged a meeting between Kimbler and Leigh Hurst, a drug dealer and longtime friend of Neely's. Hurst was wary of Kimbler's former connection to ATF, and refused to deal with Kimbler unless Neely acted as intermediary. Accordingly, Neely, Hurst, and Kimbler devised an arrangement pursuant to which Neely brokered cocaine transactions between Hurst and Kimbler. Neely simply was present during some transactions, but on other occasions Neely received cocaine from Kimbler and delivered it to Hurst, who gave money to Neely for delivery to Kimbler. In return for his efforts, Neely received approximately $200 per ounce from Kimbler, or one-third of Kimbler's profits; Neely also received 2.5 grams of cocaine from Hurst for every ounce Hurst purchased. Hurst estimated that he purchased

eight pounds of cocaine from Kimbler through Neely from October 1986 through November 1987.

Neely also introduced Kimbler to Fred Roland "Butch" Franklin, III, a high-school classmate of Neely's. As with Kimbler and Hurst, Neely facilitated cocaine transactions between Kimbler and Franklin. Kimbler estimated that he sold approximately 4.56 pounds of cocaine to Franklin through Neely.

In 1987, Neely agreed to purchase a parcel of land near Claytor Lake in Pulaski County, Virginia for $50,000. Neely was to make a down payment of $8,000 and to pay the balance in quarterly installments of $4, 200. Neely, evidently unable to meet this payment schedule, approached Kimbler and offered to make him a silent partner in the land purchase. Ultimately, Kimbler made the $8,000 down payment and agreed to alternate installment payments with Neely. However, Kimbler's name was not recorded on the deed to the property, nor was the agreement memorialized. Kimbler testified that the $8,000 used for the down payment came from a payment he had received for guarding a shipment of cocaine to Miami. Neely deposited the $8,000 into either his personal account or one of the law firm's corporate accounts, then drew a check on that account, payable to the seller of the land, for $8,000. This pattern of conduct was repeated for each quarterly payment made by Kimbler.

In August 1988, Kimbler and Neely had a disagreement concerning the payments on the property, as a result of which Kimbler ceased to make quarterly installment payments. Shortly thereafter, Neely sought to make a new partnership arrangement with another friend, Michael Giacolone, for the purpose of continuing the payments. Giacolone gave Neely $42,000 in cash in exchange for a one-half interest in the property; this money represented profits from drug transactions. Neely instructed his secretary to deposit the $42,000 into his

corporate and personal accounts in small increments in order to evade federal reporting requirements. Although Neely and Giacolone executed a partnership agreement, Giacolone's name was never recorded on the deed to the property.

The Government began to investigate Neely's activities in the late 1980s. In a 1990 case unrelated to the instant offenses, Neely pleaded guilty to misdemeanor possession of cocaine after he was videotaped using cocaine with a government informant. Also in 1990, Neely was indicted on charges of tampering with a grand jury, although he evidently was never prosecuted.[1]

A grand jury in the Western District of Virginia returned a fourteen-count, superseding indictment on September 22, 1992, charging Neely with racketeering, *see* 18 U.S.C.A. § 1962(c) (West 1984) (Count One) (including six acts of racketeering); conspiracy to aid and abet the distribution of marijuana and cocaine, to possess with intent to distribute marijuana and cocaine, and to distribute marijuana and cocaine, *see* 18 U.S.C.A. § 2 (West 1969), 21 U.S.C.A. § 841(a)(1) (West 1981) (Count Two); aiding and abetting the distribution of cocaine, *see* 18 U.S.C.A. § 2, 21 U.S.C.A. § 841 (Count Three); Money laundering, *see* 18 U.S.C.A. § 1956(a)(1)(B)(i)

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[1]The district court dismissed the indictment because the prosecution failed to provide exculpatory evidence to the grand jury. The Government appealed, and we reversed on the authority of *United States v. Williams.*, 504 U.S. 36 (1992) (holding that prosecutor is not required to present exculpatory evidence to the grand jury). *See United States v. Neely*, 966 F.2d 1445 (4th Cir. 1992) (per curiam) (unpublished), *cert. denied*, 113 S. Ct. 1261 (1993). Although the record before us is unclear, apparently the Government did not re-indict Neely.

(West Supp. 1995) (Counts Four through Nine);[2] distribution of marijuana, *see* 21 U.S.C.A. § 841(a)(1) (Count Ten); accessory after the fact to Giacolone's drug offenses, *see* 18 U.S.C.A.§ 3 (West Supp. 1995) (Counts Eleven and Twelve); tampering with a witness, *see* 18 U.S.C.A. § 1512 (West Supp. 1995) (Count Thirteen); and criminal forfeiture of certain assets and property, *see* 18 U.S.C.A. § 982 (West Supp. 1995) (Count Fourteen). The district court dismissed Counts Twelve and Thirteen and one act of racketeering prior to trial, and Neely proceeded to trial on the remaining counts. After a two-week trial, the jury convicted Neely of conspiracy to possess cocaine for personal use (the lesser included offense of Count Two), aiding and abetting the distribution of cocaine (Count Three), money laundering (Count Seven), and distribution of marijuana (Count Ten).[3] The district court sentenced Neely to 121 months imprisonment, but released him on bond pending appeal.

Throughout the pretrial proceedings, trial, and post-trial proceedings, Neely filed a plethora of motions seeking to exclude evidence or to dismiss the indictment altogether. Although Neely has been somewhat more selective in his arguments on appeal, he nevertheless asserts a broad array of reversible errors. We address these contentions seriatim.

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[2]Counts Four and Five related to Neely's dealings with Kimbler regarding the Claytor Lake property. Counts Six through Nine charged Neely with money laundering related to his various dealings with Giacolone, including the $42,000 paid by Giacolone for a one-half interest in the Claytor Lake property (Count Seven).

[3]Neely's conviction for distribution of marijuana was based on his provision of marijuana to Shirley Bassett, a friend.

II.

Neely first asserts that the district court erred in denying his numerous motions to dismiss the indictment for prosecutorial misconduct.[4] Relying in part on the precept that, "while [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones," *Berger v. United States*, 295 U.S. 78, 88 (1935), *overruled on other grounds by Stirone v. United States*, 361 U.S. 212 (1960), Neely urges us to vacate his convictions on two grounds. First, Neely claims that the Government committed certain acts of misconduct during the course of the investigation and preparation of the case against Neely. Second, Neely claims that the Government withheld numerous pieces of exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

The duty of the Government is not to obtain a conviction, but rather is to ensure that justice is achieved. *Berger*, 295 U.S. at 88. Justice is not obtained, and reversal is required, when improper conduct by the prosecutor "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainright*, 477 U.S. 168, 181 (1986) (internal quotation marks omitted). In order to obtain reversal of his convictions based on misconduct by the Government, Neely must satisfy a two-prong test: "'(1) the prosecutor's remarks or conduct must in fact have been improper, and (2) such remarks or conduct must have prejudicially affected the defendant's substantial rights so as to deprive the defendant of a fair trial.'" *United States v. Brockington*, 849 F.2d 872, 875 (4th Cir. 1988) (quoting *United States v. Hernandez*, 779 F.2d 456, 458 (8th Cir. 1985)). To the extent that the district court

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[4]Neely moved to dismiss the indictment based on allegations of prosecutorial misconduct and withholding of exculpatory evidence no fewer than five times.

makes factual findings regarding a defendant's claims of prosecutorial misconduct, our review is for clear error; in the absence of such findings, however, our review is plenary. *United States v. McDonald*, 61 F.3d 248, 253 (4th Cir. 1995). We first examine the acts of misconduct alleged by Neely and then proceed to an examination of his *Brady* claims.

A.

Neely claims that the Government committed three acts of misconduct during the investigation and preparation of the case against him. First, Neely contends that the Government violated its duty to inform the district court of the existence of a conflict of interest when it knowingly permitted Neely's former attorney, James C. Turk, Jr., to represent Hurst despite Turk's knowledge that Hurst intended to testify against Neely. *See United States v. Tatum*, 943 F.2d 370, 379-80 (4th Cir. 1991) ("[W]hen a conflict situation becomes apparent to the government, the government has a duty to bring the issue to the court's attention and, if necessary, move for disqualification of counsel.") We address this purported conflict in more detail in Part IV, *infra*. For purposes of addressing Neely's prosecutorial misconduct claim, we need only note that Turk did not represent Neely on the instant charges; thus, any conflict that may have existed was not related to this case, and, even if the Government did have a duty to inform the court of the presence of a conflict, that duty did not exist in this case. *See generally Hoffman v. Leeke*, 903 F.2d 280, 285-86 (4th Cir. 1990) (delineating circumstances in which attorney faces actual conflict of interest).

Second, Neely maintains that the Government violated his Sixth Amendment right to counsel when it, knowing that Neely was represented by counsel on pending charges of grand jury tampering, equipped Hurst with a recording device and tape-recorded two conversations between Neely and Hurst. *See*

Massiah v. United States, 377 U.S. 201 (1964) (holding that covert interrogation of defendant after right to counsel has attached violates Sixth Amendment). Of course, Neely is correct that, under *Massiah*, "[a]ny secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel" is a violation of the defendant's Sixth Amendment right to counsel. *Id.* at 205 (internal quotation marks omitted). The Sixth Amendment right to counsel, however, "is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced," e.g., upon the return of an indictment. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991); *see also Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (stating that the Sixth Amendment right to counsel attaches upon "the initiation of adversary judicial criminal proceedings--whether by way of formal charge, preliminary hearing, indictment, information , of arraignment"). Accordingly, the mere fact that an individual has been indicted for a criminal offense does not preclude the investigation of other suspected criminal activity:

> The police have an interest . . . in investigating new or additional crimes [after an individual is formally charged with one crime.] . . . [T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities.

Maine v. Moulton, 474 U.S. 159, 179-80 (1985); *see also id.* at 180 n.16 ("Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses."); *United States v. Kidd*, 12 F.3d 30, 32 (4th Cir. 1993) (same), *cert. denied*, 114 S. Ct. 1629 (1994).

Neely's claim that the Government violated *Massiah* is based on the fact that he was represented by counsel at the time of the tape-recorded conversations with Hurst. When the tape-recorded conversations occurred, however, Neely was represented by counsel on charges of conspiracy to defraud the United States by interfering with grand jury secrecy, *see* 18 U.S.C.A. § 371 (West 1996 & Supp. 1995), obstruction of justice, *see* 18 U.S.C.A. § 1503 (West Supp. 1995), and criminal contempt, *see* 18 U.S.C.A. § 401(3) (West 1966).[5] *United States v. Neely*, 966 F.2d 1445 (4th Cir. 1992) (per curiam) (unpublished), *cert. denied*, 113 S. Ct. 1261 (1993), but had not yet been indicted on the instant charges. Hence, although any incriminating statements made by Neely with respect to the pending charges would have been inadmissible, any incriminating statements made by Neely relating to allegations not yet charged would have been admissible against Neely at a trial on those charges. *See United States v. DeVillio*, 983 F.2d 1185, 1190-91 (2d Cir. 1993) (affirming admission of incriminating statements related to uncharged offense that were obtained after defendants had been indicted for another crime). Indeed, *DeVillio* is particularly instructive in light of the fact that in that case, the defendants made incriminating statements that related to both charged and uncharged offenses during the course of a covertly recorded conversation between the defendants and a codefendant acting as a government informant. In holding that the statements related to the uncharged crime were admissible, the Second Circuit implicitly concluded that the inadmissibility of the statements related to the charged offense did not taint statements regarding the uncharged offense. *See id.* at 1191. Hence, for the Government to tape record Hurst's conversations with Neely in an effort to obtain

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[5]At the time of the recorded conversations, the district court had dismissed these charges, and the Government's appeal was pending before this court.

evidence against Neely for use in prosecuting him on the instant charges was not improper.[6]

Third, Neely posits that the Government deliberately misled the district court and his attorneys respecting Kimbler's condition and ability to travel. According to Neely, the Government claimed that Kimbler was too ill to travel from a federal prison in Missouri to Roanoke, Virginia to be deposed; accordingly, Neely's attorneys travelled to Missouri to take Kimbler's deposition. Upon arriving, they discovered that Kimbler was to be transferred to a federal prison in Florida for a hearing on a motion to be released from custody. In short, Neely argues, the Government misled the district court and defense counsel about the need to travel to Missouri. Of course, if Neely's allegations are true, substantial questions are raised concerning the Government's conduct, and, unfortunately, the Government does not dispute the factual basis of this claim. Nevertheless, even if we were to assume that the Government acted improperly; we would not reverse Neely's convictions because Neely made no showing that the misconduct so prejudiced him as to deny him a fair trial. *See Brockington*, 849 F.2d at 875. Indeed, the fact that Kimbler was deposed by Neely's defense counsel prior to trial indicates that any prosecutorial misconduct with respect to representations about Kimbler's location and condition did not deprive Neely of a fair trial.

B.

Neely also contends that the Government's repeated failure

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[6]Even if the Government's conduct had been improper, the impropriety could not have denied Neely a fair trial because the district court excluded from evidence the tape-recorded conversations.

to turn over exculpatory evidence was a part of a pattern of misconduct and that this misconduct constituted a due process violation. Neely alleges five instances of nondisclosure by the Government: (1) impeachment evidence regarding Hurst's conviction for perjury, his use of narcotics, and his illegal narcotics-dealing activities; (2) impeachment materials related to Kimbler, including a tape recording of a debriefing of Kimbler by federal agents regarding Kimbler's participation in an interstate drug ring; (3) impeachment materials relevant to the testimony of Jamel Agemy, a Government witness; (4) information relating to the Government's seeking early release and a reduction in fine for Giacolone in exchange for his testimony; and (5) information regarding a statement by Gary Duncan, an individual on the Government's witness list, that Duncan and Kimbler had not used drugs together. We address these challenges in turn, keeping in mind that a determination of whether the Government acted improperly necessarily requires a determination of whether any *Brady* violation in fact occurred; if there was no *Brady* violation, the Government's conduct cannot be considered improper.

Brady v. Maryland, 373 U.S. 83 (1963), and its progeny require that the Government disclose to the defense all material evidence that is favorable to the accused. This duty applies equally to evidence that is directly exculpatory and to evidence that allows the defendant to impeach a witness. *See United States v. Bagley*, 473 U.S. 667, 676 (1985). However, the Government has no duty to disclose evidence that could have been discovered through the exercise of due diligence by the defendant. *See United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990). Thus, there is no *Brady* violation if "the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked." *Id.* at 381.

Not every failure to disclose favorable information requires

that the defendant's conviction be vacated; rather, "the suppression by the prosecution of evidence favorable to an accused . . . violates due process [only] where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. A "reasonable probability" of a different result exists "when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles v. Whitley*, 115 S. Ct. 1555, 1566 (1995) (quoting *Bagley*, 473 U.S. at 678).

With respect to Neely's first alleged instance of nondisclosure, we note that this claim relates to the Government's failure to disclose evidence that could be used to impeach Hurst during a hearing regarding pre-trial detention. *Brady*, however, is concerned only with the question of whether the defendant received a fair *trial*. Because Neely does not claim that the Government failed to provide the information in sufficient time for it to be used at trial, *see United States v. Smith Grading & Paving, Inc.*, 760 F.2d 527, 532 (4th Cir.), *cert. denied*, 474 U.S. 1005 (1985), we conclude that Neely's first allegation of nondisclosure does not state a cognizable *Brady* claim.

Similar reasoning applies to Neely's second claim of nondisclosure, which relates to the Government's alleged failure to provide, prior to the taking of Kimbler's deposition, a tape recording of a debriefing of Kimbler that revealed his involvement in an interstate drug conspiracy and a murder-for-hire scheme. Even if Neely did not receive the tape recording prior to Kimbler's deposition (a fact that is not at all clear), the parties do not dispute that the recording was provided to defense counsel well in advance of trial. As noted above, the fact that Neely received the tape recording in time to use it at

trial precludes a *Brady* claim.

With respect to Neely's third allegation of nondisclosure, the district court found that the Government's failure to disclose two investigation reports containing information useful in impeaching Agemy constituted a *Brady* violation and, accordingly, excluded Agemy's testimony. Obviously, the fact that Agemy never testified precludes a finding that the *Brady* violation related to Agemy's testimony undermines confidence in the verdict.

Neely's fourth contention is that the Government failed to reveal that Giacolone was promised early release from prison and a reduction in fine in exchange for his testimony. The Government argues that this contention lacks a factual basis, claiming that Giacolone in fact received only a two-week furlough so that he could help the Government prepare its case and that no agreement existed between the Government and Giacolone regarding a reduction in Giacolone's fine. Furthermore, the Government asserts, any promises made to Giacolone could have been discovered through diligent cross-examination of Giacolone. Because this information could have been discovered through due diligence by defense counsel, the Government posits, it had no duty under *Brady* to disclose it. We agree with the Government that any promises actually made to Giacolone could have been discovered by defense counsel during cross-examination. Additionally, we note that *Brady* does not necessarily require that exculpatory information be produced prior to trial; provided the information is discovered in time for its effective use by the defense, there is no *Brady* violation. *See Smith Grading & Paving*, 760 F.2d at 532 (holding that disclosure of exculpatory evidence during cross-examination of first Government witness did not violate *Brady*). Therefore, we conclude that there is no *Brady* violation here because Neely himself, through the exercise of due diligence, could have obtained information regarding any promises made

to Giacolone in time to use it effectively at trial.

Finally, Neely claims that the Government violated *Brady* by concealing a statement by Duncan that he had never used cocaine with Kimbler. Neely argues that this statement would have allowed him to impeach Kimbler's testimony. While this may or may not be true, Neely cannot show that Duncan's statement was material to his defense. Neely employed a host of impeachment material during his cross-examination of Kimbler, most of it far more damning than Duncan's statement. Accordingly, we conclude that assuming the Government was obligated to disclose Duncan's statement to the defense, the failure to do so does not give rise to a reasonable probability that, had the statement been disclosed, the outcome of the trial would have been different.

III.

Second, Neely maintains that his convictions were obtained in violation of his Fifth Amendment right against compelled self-incrimination. Specifically, Neely contends that he produced two sets of documents pursuant to immunity orders and that the Government violated those immunity orders by: (1) using documents to prepare its case against Neely; (2) referring to Neely as the source of documents before the grand jury; and (3) referring to Neely as the source of documents at trial. We conclude that none of these claims has merit.

The Fifth Amendment provides in part that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Supreme Court has held repeatedly that the contents of voluntarily prepared business records are not protected by the Fifth Amendment because, while possibly incriminating, their creation was not compelled. *See, e.g., United States v. Doe*, 465 U.S. 605, 610 (1984) ("[T]he Fifth Amendment protects the person asserting the

privilege only from *compelled* self-incrimination. Where the preparation of business records is voluntary, no compulsion is present." (citation & footnote omitted)); *Fisher v. United States*, 425 U.S. 391, 409 (1976) ("[T]he Fifth Amendment would not be violated by the fact alone that [an accountant's workpapers] on their face might incriminate the [defendant], for the privilege protects a person only against being incriminated by his own compelled testimonial communications . . . Furthermore, . . . the preparation of all of the papers sought in these cases was wholly voluntary . . . . " (citations omitted)).

Whether the act of producing business records has independent testimonial significance and may not be compelled absent a grant of immunity coextensive with the privilege is, however, another question. Thus, even though the contents of business records are not protected,

> "[t]he act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the [defendant]. It would also indicate the [defendant's] belief that the papers are those described in the subpoena. The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the [defendant] are both 'testimonial' and 'incriminating' for purposes of applying the Fifth Amendment. These questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof."

Braswell v. United States, 487 U.S. 99, 103 (1988) (quoting *Fisher*, 425 U.S. at 410) (citation omitted). According to the *Braswell* court, the custodian of corporate records does not

possess a Fifth Amendment privilege against the production of those records, because he holds those records only as a representative of the organization. *See id.* at 104. However, in the case of a sole proprietorship, *Braswell* holds that, under *Doe*, the custodian of the records must "be provided the opportunity to show that his act of production would entail testimonial self-incrimination." *Id.* If the custodian makes such a showing, the Government cannot compel production of the records unless it first grants the custodian immunity coextensive with the scope of the privilege. *See Kastigar v. United States*, 406 U.S. 441, 449 (1972). The district court's conclusion with respect to whether an individual is entitled to immunity for his act of producing business records is a finding of fact that we may overturn only if it is unsupported by the record. *See Doe*, 465 U.S. at 613-14.

In December 1990, the grand jury issued a subpoena addressed to "ROBERT KEITH NEELY, ESQ., Custodian of Records for sole practice law firm" requesting "ANY AND ALL client related records and documents . . . relative to *Michael Giacolone, Jamel Agemy, James Regan* for the period 1980 to September 1990." (J.A. at 508, 510) (Document Set One.) Neely moved to quash the subpoena, arguing that the documents were protected by attorney-client privilege and that being required to produce the records would violate his Fifth Amendment right against compelled self-incrimination. After the district court granted the motion to quash, Neely agreed to produce the documents pursuant to a grant of immunity. Thereafter, at the Government's request, the district court entered an order granting Neely immunity for "testimony or . . . . other information which he refuses to give or to provide on the basis of his privilege against self incrimination." (J.A. at 543-44.) Neely then produced the documents.

In May 1991, the grand jury served another subpoena, addressed to "Keith Neely, Custodian of Records, R. Keith

Neely, P.C.," seeking "ANY AND ALL records, files, [etc.] . . . maintained by the R. Keith Neely law firm" related to the purchase of the Claytor Lake property and to Kimbler, Hurst, and Franklin. (J.A. at 1151, 1153) (Document Set Two.) Neely moved to quash this subpoena; in response, the Government moved for an order of act-of-production immunity. After examining the subpoenaed documents *in camera*, the district court granted in part Neely's motion to quash. The district court held that some of the documents were subject to attorney-client privilege and that the compulsory production of others would violate Neely's right against compelled self-incrimination. With respect to the rest, the district court concluded that the documents were corporate papers not protected by the Fifth Amendment.[7] Neely subsequently produced these documents.[8]

Neely argues that the district court granted him use immunity

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[7]The district court's rulings with respect to the two sets of documents leave some question as to whether it viewed R. Keith Neely, P.C. as a sole proprietorship or as a corporation. We need not resolve this ambiguity because the contents of the subpoenaed documents were not privileged under either characterization and because we conclude that, assuming Neely's act of producing the documents was protected by a Fifth-Amendment privilege, any reference to Neely as the source of the documents was harmless beyond a reasonable doubt.

[8]We can find no support in the record for Neely's assertion that the district court granted the Government's motion for act-of-production immunity. The document to which Neely points, (*see* J.A. at 562-63), is simply a draft order submitted by the Government with its motion. The draft order was never signed by the district court.

for the contents of Document Set One, and therefore claims that the Government violated his right against compelled self-incrimination in showing the documents to two witnesses, Giacolone and Tangie Vest, a former employee of Neely's, to help the Government prepare for trial. In response, the Government argues first, that the order grants Neely only act-of-production immunity, and second, that even if the order did grant use immunity, the documents are corporate records and therefore not protected by the Fifth Amendment. After a lengthy hearing on this issue, the district court found that Neely "would enjoy immunity as to any act of production, but not as to the contents of the documents produced. While the order granting immunity was broad enough to cover any activity or testimony of the defendant, the evidence shows that the only testimonial act the defendant performed was producing the records." (J.A. at 663.)

We cannot conclude that the district court's finding that Neely's only testimonial act was the production of Document Set One is clearly erroneous. *See Doe*, 465 U.S. at 613-14. The subpoena clearly sought business records of the law firm, and Neely does not dispute that those records were created voluntarily. Accordingly, Neely possessed no Fifth Amendment right with respect to the contents of those documents. *See id.* at 610. And, given that Neely operated his law firm as a sole practitioner, the district court's finding that Neely was entitled to immunity for his act of producing the documents is not clearly erroneous. Thus, although the Government was barred from using Neely's act of producing Document Set One against him, it was free to use the contents of Document Set One to prepare its case against Neely.[9]

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[9]Neely argues that, having granted him use immunity, the Government was required to show that none of the evidence offered against Neely at trial was derived from the contents of

The district court's finding that Neely was entitled to immunity for his act of producing Document Set One necessarily means that Agent Higginbotham acted improperly when he referred to Neely as the source of Document Set One before the grand jury that received those documents. Indeed, the Government does not dispute that Agent Higginbotham's comments violated Neely's Fifth Amendment right. Rather, the Government contends that the violation was harmless beyond a reasonable doubt and reversal of Neely's convictions therefore is not required. *See United States v. Harris*, 973 F.2d 333, 338 (4th Cir. 1992) (noting that use of compelled testimony does not require reversal if error is harmless beyond a reasonable doubt). In advancing this contention, the Government rightly points out that, in addition to the fact that the Government reminded the grand jury that it was not to consider that Neely had produced the documents, the grand jury that indicted Neely was not the same grand jury that received the records, and no improper references were made to Neely as the source of Document Set One before the grand jury that actually indicted him. Under these circumstances, we conclude that neither Neely's indictment nor his trial suffered even the slightest taint from the improper references and that the error was harmless beyond a reasonable doubt.

Neely also contends that reversal of his convictions is required because IRS Agent Suzanne Hines, who testified at trial regarding various financial records including several checks that had been produced pursuant to one of the grand jury subpoenas, referred to "the defense" as the source of the

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Document Set One. *See Kastigar*, 406 U.S. at 460. Because the documents were not privileged, however, there was no prohibition against the Government using them to prepare its case against Neely. Neely's claim that the Government failed to meet its burden under *Kastigar* is therefore misplaced.

checks. (J.A. at 871WW.) According to Neely, Hines's statement requires reversal of his convictions because it referred to Neely's testimonial act of producing the documents, thereby violating his right against compelled self-incrimination. The Government concedes that Hines's statement constituted error but maintains that the district court correctly determined that this error was harmless beyond a reasonable doubt.

In concluding that Hines's reference to Neely as the source of documents was harmless beyond a reasonable doubt, the district court employed the test of *Williams v. Zahradnick*, 632 F.2d 353, 361-62 (4th Cir. 1980). Under *Williams*, the determination of whether an error is harmless beyond a reasonable doubt depends on five factors: (1) the use to which the Government put the improper reference; (2) "[w]ho elected to pursue the line of questioning"; (3) "[t]he quantum of other evidence indicative of guilt"; (4) "[t]he intensity and frequency of the reference"; and (5) "[t]he availability to the trial judge of an opportunity to grant a motion for mistrial or to give curative instructions." *Id.* The district court concluded that none of these factors weighed in favor of reversal, noting that the reference was brief, equivocal, and inadvertent; that the evidence of Neely's guilt was substantial; and that the court had considered and rejected the options of a mistrial or a curative instruction.[10] The district court was in the best position to observe the impact of Agent Hines's remark in the context of the trial as a whole. Hence, we are reluctant to disturb the district court's carefully considered ruling that the error was harmless beyond a reasonable doubt. Moreover, our review of the record leaves us with no doubt as to the fleeting nature of

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[10]The district court stated that it elected not to give a curative instruction because it feared that the cure would be worse than the disease, i.e., that the curative instruction would draw more attention to the error than it warranted.

the reference and its minimal significance when considered in light of all of the evidence presented during the lengthy trial. We therefore agree with the district court that this error does not warrant reversal because it was harmless beyond a reasonable doubt.

IV.

Next, Neely mounts a Sixth Amendment challenge to his convictions. Specifically, he posits that he was deprived of his Sixth Amendment right to counsel because the Government knowingly allowed his former attorney to represent on of the Government's witnesses on charges unrelated to the investigation of Neely. According to Neely, the Government failed to disclose to the district court a known conflict of interest, thereby resulting in Neely's being represented by counsel with an actual conflict of interest. Neely asserts that this violation of his Sixth Amendment right to counsel entitles him to a new trial.

The district court held a lengthy hearing on Neely's Sixth Amendment claim, at which the following facts were adduced. The Government's investigation of Neely, led by FBI Agent Gerald Fayed and IRS Agent Hines, began sometime in the late 1980s. In 1990, Neely pleaded guilty to misdemeanor cocaine possession. Neely was represented in the case by his friend Turk. Neely was placed on probation after his guilty plea; at this point Turk believed that his representation of Neely had ended.

In March 1992, Neely contacted Turk and requested that Turk represent Hurst, who had been charged with money laundering and released on bond. Turk undertook the representation only after being assured by both Neely and Hurst that no conflict of interest existed. At approximately the same time, Turk made several inquiries to the court and to the

probation office regarding the possibility of an early release from probation for Neely. Turk avowed that he made the inquiries as a favor to Neely, not as his counsel, emphasizing to the district court that he informed Neely that he was not representing Neely at that time. Turk's last activity regarding Neely's probation status occurred on April 15, 1992.

Shortly after he agreed to represent Hurst, the Government informed Turk of its belief that Hurst, Neely, and Kimbler had participated jointly in drug-related activities and offered the possibility of a reduced sentence for Hurst if he agreed to testify against Neely. Additionally, Turk reviewed discovery material in the Government's possession and found an affidavit by Kimbler indicating that Hurst and Neely might be linked to drug trafficking. In response to Turk's inquiry, Hurst stated that he did not want to testify against Neely, but did not admit or deny the truth of the Government's allegations regarding his association with Neely. According to Turk, Neely repeatedly contacted him regarding the Hurst case, making inquiries and suggesting strategies in a manner that made Turk suspect that "Neely was trying to manipulate Hurst's defense in order to protect himself." (J.A. at 1358.)

On May 12, 1992, the Government moved to revoke Hurst's bond on the basis of a urinalysis that tested positive for cocaine use. Hurst informed Turk that Neely gave him cocaine that had resulted in the positive urinalysis and told Turk that he now wished to testify against Neely. At that point, Turk informed Hurst that he could no longer serve as his attorney and advised him to seek new counsel. Before officially withdrawing as counsel, however, Turk attended a meeting between Hurst and the Government to negotiate a plea agreement. After the meeting, Hurst met with Government investigators several more times and met with Neely while wearing a recording device. Turk stated that he had no specific knowledge of these activities and that he did not provide Hurst with any legal advice

regarding them. Turk was present at Hurst's plea hearing because Hurst's substitute counsel was unavailable. At that time, Turk informed the court of the conflict and formally withdrew as counsel.

Prior to trial, Neely moved to suppress Hurst's testimony on the basis that Turk's simultaneous representation of Hurst (on money laundering charges unrelated to Neely) and Neely (on early release from probation) violated Neely's right to counsel in this case. The district court held a lengthy hearing at which Turk and others testified. Ruling from the bench, the district court concluded that, regardless of Turk's view that he was not "representing" Neely with respect to Neely's probation status, Turk remained Neely's counsel throughout Turk's representation of Hurst. The court also opined, however, that Neely's Sixth Amendment right with respect to the instant charges was not implicated by the dual representation because Neely had not yet been indicted. Additionally, the district court held that any prejudice to Neely from the dual representation affected only Neely's possible early release from probation, not the pending charges.

That a defendant's Sixth Amendment right to counsel includes the right to counsel free from serious conflicts of interest is beyond question. *See Hoffman*, 903 F.2d at 285. A defendant's right to counsel has been violated when an "actual conflict of interest adversely affect[s] his lawyer's performance." *Id.* at 286 (internal quotation marks omitted). Such a conflict exists when an attorney simultaneously represents two individuals whose interests are adverse. *See id.* at 285.

Neely's Sixth Amendment claim is patently without merit. Assuming that Turk labored under an actual conflict of interest in his simultaneous representation of Hurst and Neely, this conflict related only to Turk's representation of Neely on the cocaine-possession matter. Because Turk did not represent

Neely on the instant charges -- indeed, the conflict was resolved before Neely was even indicted on these charges -- Neely was not represented by counsel laboring under an actual conflict of interest, and could not have suffered a deprivation of his right to counsel.

V.

Neely further contends that the Government abused the grand jury process by commencing a grand jury investigation of Franklin before Neely's trial took place. According to Neely, the investigation of Franklin was a mere pretext for the Government's real purpose, namely acquiring more evidence against Neely. The Government counters that its investigation of Franklin was legitimate. We find Neely's claim to be without merit.

A court should not intervene in the grand jury process absent a compelling reason. *See United States v. Dionisio*, 410 U.S. 1, 16-18 (1973). A presumption of regularity attaches to grand jury proceedings, and Neely has the burden of showing that this presumption is unwarranted. *See United States v. Moss*, 756 F.2d 329, 332 (4th Cir. 1985). While the Government may not utilize a grand jury "solely or even primarily for the purpose of gathering evidence in pending litigation," *id.*, the existence of a pending indictment does not preclude the Government from using a grand jury to make a good-faith inquiry into charges not included in the indictment, *id.* Provided investigation of the defendant is not the Government's "sole or dominant purpose" in convening the grand jury, no abuse of the grand jury process has occurred. *Id.* The advantage of this rule is that it allows grand juries to conduct continuing investigations without waiting to indict persons against whom sufficient evidence to indict has been obtained:

Lacking clairvoyance, grand juries must be allowed to

> investigate freely individuals suspected of involvement in crimes for which indictments have already been issued. When applied correctly, the sole or dominant purpose test plainly permits grand juries to investigate additional individuals who become suspects only after an indictment has been returned, while precluding improper use of the grand jury for discovery.

Id. The district court's determination regarding the Government's sole or dominant purpose in conducting a grand jury investigation is a factual finding, which we review only for clear error. *Id.*

Franklin was named, but not indicted, in the indictment charging Neely. After the indictment was returned, but before Neely's trial, a grand jury was convened to investigate Franklin on charges unrelated to the Neely indictment. Immediately upon learning of the investigation, Neely filed an emergency motion to enjoin the grand jury proceedings. The district court held an emergency hearing on Neely's motion, during which Neely asserted his belief that the investigation of Franklin was being used as a discovery device in the Government's case against Neely. In response, the Government proffered, under seal, its reasons for investigating Franklin. Agent Fayed testified that the grand jury's investigation of Franklin was related to Franklin's suspected distribution of marijuana and cocaine and that the Government had proceeded with its investigation of Franklin because its key witness, Kimbler, was suffering from terminal cancer, making it necessary to secure his testimony for trial in the form of a videotaped deposition. The Government, therefore, had to determine whether there was sufficient evidence against Franklin to indict him so that he could be present during the deposition.

Based on this information, the district court concluded that the Government's investigation of Franklin was conducted in

good faith, and that the investigation was not being carried out for the sole or dominant purpose of acquiring evidence against Neely. We cannot say that this finding was clearly erroneous, and accordingly, decline to reverse Neely's convictions on this basis.

VI.

Neely next maintains that the district court committed reversible error by allowing the Government to designate two case agents, Agents Fayed and Hines, both of whom were exempted from the district court's order sequestering witnesses. *See* Fed. R. Evid. 615.[11] While we agree with Neely that an error was committed, we find the error harmless.

Rule 615 provides for the exclusion of witnesses at the request of a party. Exclusion is a matter of right; once a request is made, the court "shall" sequester the witnesses. *Id.; see United States v. Farnham*, 791 F.2d 331, 334-35 (4th Cir. 1986). Rule 615 is designed to aid the truth-seeking process by denying the opportunity for witnesses to collude or for one witness to tailor his testimony to the testimony of another. *See id.* at 334-35. Every witness need not be excluded, however. Rule 615 exempts from sequestration: (1) a party who is a natural person; (2) a designated representative of a party that is

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[11]Rule 615 provides:

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

not a natural person; and (3) a person whose presence is essential to the presentation of the case. Fed. R. Evid. 615. That the Government's investigating agent may be exempted from sequestration pursuant to Rule 615(2) is beyond dispute, *see United States v. Parodi*, 703 F.2d 768, 773 (4th Cir. 1983); that the Government may designate only one such agent is equally clear. *Farnham*, 791 F.2d at 335.

The Government erroneously relies on *United States v. Kosko*, 870 F.2d 162, 164 (4th Cir.), *cert. denied*, 491 U.S. 909 (1989), for the proposition that "a district court may permit two case agents to remain in the courtroom if their testimony does not overlap and undermine the integrity of the fact-finding process." (Appellee's Brief at 35.) In *Kosko*, we affirmed the district court's ruling allowing a DEA agent and an IRS agent, both of whom had participated in the investigation of the defendant, to remain in the courtroom during trial because the latter agent was present in the courtroom as an expert witness whose presence was essential to the presentation of the Government's case. *Kosko*, 870 F.2d at 164; *see* Fed. R. Evid. 615(3). Indeed, *Kosko* explicitly reaffirmed the holding of *Farnham* that the Government may designate only one case agent as its representative. *Kosko*, 870 F.2d at 164. Regardless of the wisdom of the Government's position that a district court may designate more than one case agent when each agent represents a different governmental agency and their trial testimony will not overlap, we are bound by *Farnham* and *Kosko* to reject it.

In short, the district court erred in permitting the Government to designate two case agents, both of whom were exempted from the sequestration order and both of whom testified at Neely's trial. The question remains, however, whether this error requires us to reverse some or all of Neely's convictions. *See Farnham*, 791 F.2d at 335 (holding that a violation of Rule 615 does not require vacatur of convictions if

the error was harmless). Although both agents testified during the trial, their testimony concerned entirely different matter: Agent Fayed's testimony concerned Neely's telephone records, while Agent Hines testified regarding Neely's financial records. *Cf. Kosko*, 870 F.2d at 164 (concluding that because "the testimony of the two agents did not overlap as to any matter on which they had personal knowledge, . . . their mutual presence during trial could not have undermined the integrity of the fact-finding process"); *Farnham*, 791 F.2d at 334 (finding violation of Rule 615 not harmless when two agents testified regarding their personal knowledge of the same events). We therefore conclude that the error was harmless.

VII.

Finally, Neely contends that his convictions for conspiracy to possess cocaine for personal use (Count Two) and aiding and abetting the distribution of cocaine (Count Three) are mutually exclusive, thereby requiring reversal of Count Three, the more serious crime. Specifically, Neely claims that the affirmative finding of intent required for a conviction on the possession count -- i.e., the intent to possess cocaine -- necessarily precludes an affirmative finding of the intent required for conviction on the aiding and abetting count -- i.e., the intent to distribute cocaine -- because one cannot intend simultaneously to possess something and distribute it.

We are not persuaded by this argument. There was ample evidence from which the jury could conclude that Neely conspired with other individuals to obtain cocaine for his personal use while simultaneously aiding and abetting Kimbler in his distribution activities. At most, the jury's verdicts on these counts are inconsistent, but this does not entitle Neely to an acquittal on Count Three. *See United States v. Powell*, 469 U.S. 57, 63 (1984); *see also United States v. Arrington*, 719 F.2d 701, 705 (4th Cir. 1983) (concluding that acquittal on

conspiracy charge is not a valid basis for reversal of conviction on charge of aiding and abetting), *cert. denied*, 465 U.S. 1028 (1984).

VIII.

We have reviewed carefully all of Neely's assignments of error and conclude that none of them warrants reversal of his convictions. Accordingly, Neely's convictions are affirmed.

AFFIRMED

Appendix B:
Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 11, 1996

No. 94-5107
CR-92-78-R

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

ROBERT KEITH NEELY,
Defendant-Appellant.

On Petition for Rehearing with Suggestion
for Rehearing In Banc

Appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is

of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

Appendix C:
Mandate

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 19, 1996

No. 94-5107
CR-92-78-R

US v. Neely

MANDATE

The judgment of this Court dated 2/13/96 takes effect today.

BERT M. MONTAGUE
CLERK